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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 332 Misc.

ROBERT M. SIMMONS, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

No. 350 Misc.

ROBERT W. MCMAHAN, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

In No. 332 Misc., petitioner, while serving in the Army in Germany, was convicted by a general court-martial of rape and other crimes (II R. 3-4,

329). His sentence to life imprisonment (II R. 331) was later reduced to ten years (II R. la). On June 21, 1948, while serving this sentence in Leavenworth Penitentiary, he filed a petition for a writ of habeas corpus challenging the validity of his conviction on the grounds that he was denied a fair trial by reason of the alleged action of the Staff Judge Advocate in advising the members of the court and counsel prior to the trial that he did not want them to take into consideration the fact that the prosecutrix and witnesses were Germans or Nazis and that the court should give great weight to their testimony because it was important that the perpetrators of the crime be punished; that the evidence was insufficient to prove the crimes charged; that hearsay evidence was admitted against him; that the Trial Judge Advocate failed to call a material witness whose testimony would have contradicted the prosecutrix; that defense counsel was denied the right fully to cross-examine German witnesses and to introduce evidence that certain of them were Nazi party members (compare, in respect of these allegations, *Hiatt* v. *Brown,* No. 359, decided March 13, 1950); that the review of his case by the Board of Review was illegal because it was conducted by two officers, whereas AW 50½ (10 U.S.C., 1946 ed., 1522) required a board of three officers; and that he was denied the right to cross-examine witnesses at the pre-trial investigation

under AW 70 (10 U.S.C., 1946 ed., 1542), (compare *Humphrey* v. *Smith,* 336 U. S. 695) (I R. 1-7). On May 31, 1949, after hearing, the District Court denied the petition on the merits (I R. 28-36). Petitioner filed an appeal on June 3, 1949 (I R. 39), and he was released on bond (I R. 37).

In No. 350 Misc., petitioner was convicted of attempted rape by a general court-martial convened in Germany (II R. 156). His sentence to 15 years' imprisonment (II R. 157) was later reduced to 10 years (II R. 158). On March 9, 1948, he filed a petition for a writ of habeas corpus in the District Court for the District of Kansas attacking his conviction on the grounds that there was no pre-trial investigation of the charges as required by AW 70 (compare *Humphrey* v. *Smith, supra*), and that the counsel appointed to defend him was not a lawyer and was inexperienced and did not substantially perform his duties as required by paragraphs 43b and 45b of the Manual for Courts-Martial, U.S. Army, 1928 (compare *Hiatt* v. *Brown, supra*) (I R. 1-2). On June 26, 1948, after hearing, the petition was denied on the merits (I R. 10-11), and on June 6, 1949, the court denied a motion for a new trial (I R. 13-21). Petitioner filed his appeal on the same day, June 6, 1949 (I R. 26), and he was released on bond pending appeal (I R. 25).

The appeals were consolidated and argued together (No. 332 Misc., I R. 189; No. 350 Misc.,

I R. 122). In its opinion in No. 350 Misc., filed January 4, 1950, the Court of Appeals held, elucidating on its earlier *per curiam* decision in *Spencer* v. *Hunter, Warden,* 177 F. 2d 370, that petitioner was not entitled to invoke the habeas corpus jurisdiction of the courts until he had exhausted his right under AW 53 of the amended Articles of War, which became effective on February 1, 1949, 62 Stat. 639, 10 U.S.C. (Supp. II) 1525, to apply to the Judge Advocate General for a new trial.[1] The judgment of the District Court

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[1] AW 53, an innovation in military law, provides:

"Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States."

Regulations prescribed by the President pursuant to this article appear in Ch. XXII of the Manual for Courts-Martial,

was accordingly affirmed, but "without prejudice to [petitioner's] rights to file a new application for the writ of habeas corpus, after having complied

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U. S. Army, 1949 (effective February 1, 1949), pp. 108-110, and provide in part:

"* * * The petition should show good cause for the remedy requested. The petition may be submitted either by the accused or by his counsel or representative, regardless of whether he is in the service or has been separated therefrom. A petition may not be submitted after the death of an accused.

"Good cause for granting a new trial, for vacation of a sentence, or for other remedy shall be deemed to exist only if within the discretion of The Judge Advocate General all the facts and information before him, including the record of trial, the petition and other matter presented by the accused, affirmatively establish that an injustice has resulted from the findings or sentence. In cases in which sentences have been confirmed by the President pursuant to Article 48, matters relating to issues of alleged error or injustice which were before the President at the time of confirmation will not, in the absence of newly discovered evidence bearing upon such issues, establish sufficient cause for relief under Article 53.

"102. Form of Petition; Procedure.—The petition * * * will contain the following:

* * *

"(5) A full statement of the fact, ruling, or error which is relied upon as good cause for the remedy sought. No fact, ruling, or error other than matters relating to jurisdiction will be deemed to constitute good cause unless it had a substantial contributing effect upon the findings of guilty or upon the sentence imposed. * * *

* * *

"Upon written request and within his discretion The Judge Advocate General may allow oral argument upon a petition. Any hearing granted will be conducted under rules prescribed by The Judge Advocate General, and the hearing may be before The Judge Advocate General or before an officer or officers designated by him. The Judge Advocate General may cause such additional investigation to be made and such additional evidence to be secured as he may deem appropriate.

"Action in granting or denying a remedy under Article 53 shall be taken by The Judge Advocate General in writing signed in his own hand or by his direction. When appropriate the action granting a remedy will be published in Department of the Army orders."

with the requirements of Article of War 53." (I R. 123-127; 179 F. 2d 661, 663.) In No. 332 Misc., the order of the District Court was affirmed on the authority of the decision in No. 350 Misc. and a similar judgment was entered (I R. 190-191; 179 F. 2d 664).

The decisions below merely apply the familiar doctrine that habeas corpus is an extraordinary remedy which will not ordinarily lie where the law has provided another remedy. *E.g., Darr* v. *Burford,* No. 51, decided April 3, 1950; *Sunal* v. *Large,* 332 U.S. 174; *Adams* v. *U.S. ex rel. McCann,* 317 U.S. 269, 274-275; *Goto* v. *Lane,* 265 U.S. 393, 401; *Glasgow* v. *Moyer,* 225 U.S. 420. That doctrine has been applied where the applicant for habeas corpus, as here, has failed to exhaust the administrative remedies provided by law. *United States* v. *Sing Tuck,* 194 U.S. 161, 167-168, 170; *Lee Fong Fook* v. *Wixon,* 170 F. 2d 245, 246 (C.A. 9), certiorari denied, 336 U. S. 914. A statutory analogy is found in the provisions of Section 2255 of the 1948 revision of Title 28, U.S.C., precluding the entertainment of an application for a writ of habeas corpus on behalf of a prisoner in custody under sentence of a federal court who claims that his sentence is subject to collateral attack, "if it appears that the applicant has failed to apply for relief, by motion [as authorized by this section], to the court which sentenced him, or that

such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

There is no reason why this doctrine should not apply in the situation presented by these cases. The new AW 53 provides an adequate and practical remedy within the framework of the administration of military justice for canvassing any issue cognizable on habeas corpus, as well as others not so cognizable, for taking evidence and resolving disputed issues of fact, and for correcting injustices. Indeed, as the court below pointed out (No. 350 Misc., I R. 125), AW 53 affords "much broader relief than can be granted in a habeas corpus proceeding"; and, as the Fifth Circuit said in *Whelchel* v. *McDonald, Warden,* 176 F. 2d 260, 263, "This remedy is much better adapted to reach justice than any within the power of the district court on habeas corpus." In addition, the "sifting process" (see *United States* v. *Sing Tuck,* 194 U.S. at 170) provided by AW 53 will aid the courts in cases where their habeas corpus jurisdiction is later invoked and, of course, will relieve the courts altogether in those cases where the applicant is successful in his application to the Judge Advocate General.[2] The

[2] The Office of the Judge Advocate General of the Army advises that during the period from February 1, 1949, to February 15, 1950, 245 applications under AW 53 were received by the Judge Advocates General of the Army and Air Force, of which 66 were acted upon during that period and relief granted in 9 cases.

result is a better and more orderly administration of justice in court-martial cases.[3]

It is no answer to argue that "The doctrine of the exhaustion of administrative remedies has no application to petitioner since petitioner alleges he is now illegally and unlawfully detained of his liberty in violation of the Constitution" (No. 332 Misc., Pet. 5-6; No. 350 Misc., Pet. 6). A similar contention was rejected in *United States* v. *Sing Tuck, supra,* a habeas corpus proceeding by applicants for admission into the United States who claimed to be citizens but had failed to invoke their statutory right to appeal to the Secretary of Commerce and Labor from the adverse decision of the immigrant inspector excluding them. Speaking for the Court, Mr. Justice Holmes said (194 U.S. at 168):

> We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice

[3] Petitioner McMahan claims (Pet. 13) that he wrote a letter to the Judge Advocate General on October 16, 1947, applying for clemency or a new trial and that he was advised that his application for clemency had been denied, but that he has never been advised of any action on his application for a new trial. However, AW 53 did not become effective until February 1, 1949, and petitioner is now free to file a proper application in accordance with the regulations prescribed by the Manual (see note 1, pp. 4-5, *supra*).

> that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. * * *

Neither is there any merit in petitioners' suggestion (No. 332 Misc., Pet. 4; No. 350 Misc., Pet. 4) that AW 53 should not be invoked to foreclose final appellate determination of a habeas corpus proceeding instituted prior to its effective date. For, as the court below pointed out, "where a rule of law [is] changed after the decision in the trial court but before the decision in the Appellate Court, the decision in the Appellate Court must be according to the new law" (No. 350 Misc., I R. 126). The Fifth Circuit applied the same rule in identical circumstances (*Whelchel* v. *McDonald, Warden,* 176 F. 2d 260, 262-263) and the Fifth, Sixth and Tenth Circuits have followed it on appeals by the Government from decisions discharging prisoners on the ground that their court-martial convictions were invalid. *Hiatt, Warden* v. *Burchfield, Hiatt* v. *Fugate, Hiatt* v. *Jackson,* 179 F. 2d 679-680 (C.A. 5); *Hunter, Warden* v. *Beets,* C.A. 10, decided February 2, 1950; *Schilder, Warden* v.

Gusik, C.A. 6, decided March 20, 1950. Cf. *Walker* v. *Ragen, Warden,* and other cases, 338 U. S. 833; *Marks* and *James* v. *Ragen, Warden,* Nos. 356 Misc. and 404 Misc., this Term, decided March 27, 1950.

Finally, petitioners' attack upon the finality provision of AW 53 as violative of due process and as constituting, in effect, a suspension of the writ of habeas corpus (No. 332 Misc., Pet. 6, 7, 12; No. 350 Misc., Pet. 6-7, 8, 12), is unavailing, since, as the court below pointed out (No. 350 Misc., I R. 127), "There will be time enough to meet and answer that question when it is necessarily involved in an appeal before the court." Cf. *United States* v. *Sing Tuck,* 194 U.S. at 170. In disposing of a similar contention in *Schilder, Warden* v. *Gusik, supra,* the Sixth Circuit added:

> * * * It seems to us, however, that we meet one aspect of that question now, for it would seem unsound to relegate the appellee to an application for review under Article 53 at the hazard of surrendering important constitutional rights if such hazards exists. Whether the finality provision, literally read, is constitutional or not, we need not decide, for applying the principle of decision so often availed of, that an issue of constitutionality will not be considered if an act may reasonably be so read that constitutional validity appears, it would seem that all that is meant by the finality provision in Article 53 is that decision upon the merits is final and does not go to those contentions which attack decision

> collaterally. So read the finality created by Article 53 differs in no wise from the finality, in the absence of or after futile appeal, accorded to trial decisions upon consideration of a writ of habeas corpus.[4]

As we have indicated, the three Courts of Appeals—for the Fifth, Sixth and Tenth Circuits—which have considered this question are unanimous in their holdings that a prisoner must exhaust the remedy provided by AW 53 before resorting to habeas corpus.[5] There are no contrary decisions.[6]

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[4] See also Manual for Courts-Martial, U. S. Army, 1949, p. 8:

"The proceedings, findings, and sentences of courts-martial as approved, reviewed or confirmed pursuant to the Articles of War are final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, and agencies and officers of the United States, subject only to action upon application for a new trial as provided in Article 53 (A.W. 50h). Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers."

[5] The question was not raised in the Fifth Circuit in *Hiatt* v. *Brown*, 175 F. 2d 273, decided on June 16, 1949, a little more than a month before the decision of that court in the *Whelchel* case, *supra*, 176 F. 2d 260. While the *Brown* case was pending in this Court, No. 359, decided March 13, 1950, we brought to the Court's attention in our reply brief (pp. 11-13) the Fifth Circuit's *Whelchel* decision and the decisions in the instant cases and cited in addition two district court decisions to the same effect. We pointed out, however, that a conflict between circuits was involved on the principal question presented for decision and that there was no reason to anticipate that the Judge Advocate General would depart from the long course of military decisions on that question on an application under AW 53, and we urged the Court to decide the merits. No such considerations are involved in the instant cases. The rule of judicial administration involved

(Footnotes 5 and 6 continued at bottom of page 12)

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

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APRIL 1950.

(Footnotes 5 and 6 continued from page 11)

here was not suggested in *Wade* v. *Hunter*, 336 U. S. 684, or *Humphrey* v. *Smith*, 336 U. S. 695, to which petitioners refer (No. 332 Misc., Pet. 9; No. 350 Misc., Pet. 10). These cases were decided by this Court on April 25, 1949, less than three months after the effective date of AW 53, and three months prior to the Fifth Circuit's *Whelchel* decision, the first to invoke the principle involved here.

[6] *Levers* v. *Anderson*, 326 U. S. 219, 222, which applied the rule that the doctrine of exhaustion of administrative remedies "does not automatically require that judicial review must always be denied where rehearing is authorized but not sought" does not stand in the way of the decisions below even though, in these cases, the Judge Advocate General had once approved petitioners' court-martial convictions in the course of the original review proceedings (No. 332 Misc., II R. 1; No. 350 Misc., II R. 1-2). That case involved an ordinary appeal provided by statute, not an application for the extraordinary writ of habeas corpus. See cases cited, *supra*, p. 6. Moreover, the remedy afforded by AW 53, unlike that involved in *Levers* v. *Anderson*, is one explicitly provided by Congress apparently, in part, for the very purpose to which it has been put in these cases, *i.e.*, to avoid swamping the courts by a resort to them in the first instance before the "preliminary sifting process provided by the statutes" is "gone through with". *United States* v. *Sing Tuck*, 194 U. S. 161, 170.

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